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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 977.

GEORGE S. ALLEN, TRUSTEE OF THE ESTATE OF ASH TRUCK LINES, INC., PETITIONER,

VS.

UNION TRANSFER COMPANY, A CORPORATION, DOING BUSINESS AS UNION FREIGHTWAYS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

LOUIS R. GATES,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered December 24, 1945 (R. 69), affirming a judgment entered by the District Court on Review (R. 54, 55), setting aside and vacating the following orders of the Referee in Bankruptcy:

(a) setting aside the sale of the assets on December 18, 1944, to The Union Transfer Company for $4,250 and the Order of confirmation thereof;

(b) directing the resale of the assets;

(c) The sale of the assets on January 31, 1945, to Watson Bros. Transportation Company for $9,050 and the order of confirmation thereof.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Referee in Bankruptcy set aside the confirmed sale of the principal asset of the Bankrupt for $4,250, upon finding that sale price to be grossly inadequate, and that asset was resold by the Trustee in Bankruptcy for $9,050 and that sale was confirmed by the Referee.

The Referee made extensive and detailed Findings of Fact at the time the original sale was set aside and the second sale was had (R. 16-20).

They were adopted as the Court's Findings of Fact by the District Court on Review (R. 51) but the District Court concluded that the Referee exceeded his discretionary powers (R. 54). Judgment was entered accordingly (R. 54-55). Trustee in Bankruptcy appealed (R. 59-60).

The original sale was made on December 18, 1944, at the first session of the first meeting of creditors (R. 4). On January 31, 1945, that sale was set aside and assets resold at the recessed session of the first meeting of creditors (R. 9).

Bankrupt, Ash Truck Lines, Inc., was a motor carrier, operating under intrastate and interstate permits in Nebraska, Kansas and Missouri (R. 44).

Ash Truck Lines was adjudicated a Bankrupt on November 24, 1944 (R. 17).

At the first session of the first meeting of Creditors, the State Corporation Commission of Kansas filed its claim for mileage tax in the amount of $297.64 and asserted that it was a first and prior claim under Sec. 66-1124, G. S. Kan., 1943 Supp. (R. 7).

Facts Confronting Referee When Sale Set Aside and New Sale Ordered.

The principal asset of the bankrupt consisted of the operating rights mortgaged for $3,143.03 (R. 6), claims of secured creditors were listed at $7,946.23 (R. 6), prior claims were listed at $2,174.68 (R. 5), unsecured claims were listed at $11,578.95 (R. 6), operating rights had been appraised at $7,500, and there had been no operation of the truck lines of the bankrupt since October 17, 1944 (R. 7).

Sale of the principal asset had been made December 18, 1944, for $4,250 to Respondent (R. 17).

The State Corporation Commission of Kansas had threatened cancellation of the operating rights since December 18, 1944 (R. 34), and had issued citation to show cause why they should not be cancelled and the attorney for respondent had been continuously notified of the hearing on the citation to show cause order (R. 34-35) and the Corporation Commission this date was still insisting upon cancellation unless the mileage tax was paid forthwith (R. 7, 34, 12).

The Trustee in Bankruptcy had no funds on hand with which to pay the mileage tax and no asset from which the mileage tax could be realized other than by the sale of the operating rights.

The payment of the mileage tax could not be made by the Trustee in Bankruptcy from and out of the $4,250 deposited by the respondent at the first sale for the reason that the contract of sale, clause 6, provided that the Trustee in Bankruptcy would retain said sum of $4,250

> "in escrow until such time as the Interstate Commerce Commission enters an order authorizing the purchase herein agreed upon and said order becomes finally effective and permanent. Authority to operate the above described routes and territories is finally vested in the purchaser, and approval of the transfer by the Corporation Commission of Kansas at which time said escrow agreement shall cease and determine and the full sum of $4,250 become the sole and separate property of the above named Trustee" (R. 42).

Notwithstanding the Respondent had knowledge since December 18, 1944, of the threatened cancellation of the operating rights, nevertheless the Respondent had failed, refused and neglected to advance the sum sufficient to pay the mileage tax (R. 7, 34, 35) and the respondent had not filed an application for the transfer of the operating rights (Referee Finding of Fact 11, R. 19).

On January 6, 1945, some nineteen days after the first sale a deposit of $6,250 had been made with the Trustee in Bankruptcy as a firm bid if the bidding were reopened (R. 18).

On January 29, 1945, applications of two nationally known creditors, Consolidated Builders Supply Company of Omaha, and J. I. Case Company of Kansas City, seeking to set aside the sale were filed and likewise their claims were filed.

Said applications showed that said creditors had no notice of the sale of the operating rights or of the first meeting of creditors and had no knowledge of the bankruptcy proceedings until after January 1, 1945, and that

if the former sale should be set aside that bids higher than the sum of $6,250 already on deposit would be made, and that if the former sale remained in effect and the first mortgage on the operating rights should be paid and the costs of administration were paid, that then and in that event the moving creditors would receive no payment of their claims, and that in the event bids were reopened and a higher sum as above indicated, received, that the creditors would receive payment of their claims (R. 8-9).

Notice had been given to the respondent that at this recessed session of the first meeting of creditors, these applications to set aside the sale would be heard (R. 3) and the attorney for respondent at the opening of the recessed session of the first meeting of creditors made the following statement to the creditors and Referee in Bankruptcy:

> "The Court has here a highly perishable asset which is subject to being revoked by the Kansas State Corporation Commission for abandonment, and more delay in these hearings may make the property totally valueless and worthless to any purchaser" (R. 11).

Other portions of the statement are elsewhere set out (R. 3).

The Referee at the opening of the recessed session of the first meeting of creditors made the following statement to the creditors:

> "I would say in addition to that, that there should be no distribution of money to any of the creditors until the matter is finally consummated, or unless through some fault of the purchaser the matter is not consummated, except that this tax money ought to be paid. I have this suggestion to make to the creditors, I do think the taxes should be paid in order to get the transfer.

> We may be subrogated to the rights of the State, but of that I am not sure. However it seems to me that we are required to pay the taxes in order to protect ourselves. I rather think the State has kind of the whip-hand. I would feel that way if I was on the commission but it is a very nice question" (R. 12).

Thereupon the hearing on said applications to set aside the sale was held and the two creditors proved that they had no notice of the first meeting of creditors or the sale and had no knowledge of the bankruptcy proceedings until after January 1, 1945, and the details of acquiring knowledge are set out (Referee Findings of Fact 8, 9, R. 18).

At the hearing to set aside the sale, three witnesses testified that they were there prepared to forthwith make bids substantially in excess of $6,250 which was already on deposit, and that each qualified as being a motor carrier operating in excess of 17 and 20 motor vehicles respectively, and one bidder was a practicing lawyer, bidding for an undisclosed principal, but stating his client was a motor carrier operating in excess of 17 vehicles (R. 11).

The evidence offered on behalf of the respondent is summarized in referee's finding of fact 11 (R. 19).

Thereupon the Referee found the sale price grossly inadequate (R. 19) and set aside the former sale for $4,250, ordered a new sale, and spirited and competitive bidding at auction immediately began. The operating rights were sold for $9,050 and that sale confirmed. Referee Finding of fact 15 (R. 20).

The Referee in Bankruptcy obtained an agreement from the purchaser at the second sale that the mileage tax to the Kansas Corporation Commission in the amount of $297.64 could be paid and under no circumstances to be refunded to the purchaser, Referee finding of fact 16 (R. 20).

The Referee ordered and directed the trustee to forthwith return to the respondent, the said sum of $4,250 (R. 22).

The Referee further ordered that upon the consummation of the sale for $9,050 that a hearing be held upon notice for the purpose of determining what amount, if any, in excess of the purchase price of $4,250 should be refunded to the respondent in order to restore it to its former status (R. 23).

II.

JURISDICTION.

The judgment of the Tenth Circuit Court of Appeals was entered December 24, 1945 (R. 69), and the opinion is reported in 152 F. 2d 633.

The jurisdiction of this Court is invoked under Section 240 of the judicial code, as amended by the Act of February 13, 1925 (Title 28, U. S. C., Sec. 347).

The opinion of the District Court is set out (R. 55-9).

The date of this petition for certiorari is March 18, 1946.

III.

QUESTIONS PRESENTED.

1. Where gross inadequacy of price is found to exist by the Referee in Bankrupcty and also so found by the District Court on Review, and the gross inadequacy was such as to shock the conscience of the Referee in Bankruptcy to the extent that such Referee set aside the confirmed sale made at such grossly inadequate price of $4,250, and ordered a resale resulting in a sale price of $9,050, may the District Court on Review, having adopted

all the Referee's findings as the findings of fact of the Court, including such finding of gross inadequacy of price as aforesaid, determine that such gross inadequacy of price does not shock the conscience of the Court and therefore conclude that the Referee in Bankruptcy abused his discretion in setting aside the confirmed sale?

2. Where the Circuit Court of Appeals has before it a record wherein the trial court adopted the findings made by the Referee and the issue presented is one of law, viz. —Did the Referee abuse his discretion in setting aside the original sale and the confirmation thereof—may the Circuit Court of Appeals, for the reason that the gross inadequacy of price did not shock the conscience of the District Court, therefore conclude that as a matter of law the Referee in Bankruptcy abused his discretion in setting aside the original sale and confirmation thereof?

3. Where gross inadequacy of price has been found to exist by the Referee in Bankruptcy and by the District Court on Review and the gross inadequacy was such as to shock the conscience of the Referee in Bankruptcy to the extent that such Referee set aside the confirmed sale made at such grossly inadequate price of $4,250 and ordered a resale resulting in a sale price of $9,050 and where the District Court on review adopted all the Referee's Findings as the findings of fact of the Court, including such finding of gross inadequacy of price as aforesaid, may the Circuit Court of Appeals consider the question of whether or not the conscience of the Referee in Bankruptcy was shocked as being a question of law only and therefore determine that since the conscience of the District Court is not shocked, that as a matter of law, the Referee in Bankruptcy abused his discretion in setting aside the sale made at such grossly inadequate price?

4. Under the facts and circumstances of this case confronting the Referee in Bankruptcy when the Referee set aside the original sale and ordered a new sale, is the decision of the Circuit Court of Appeals, on an important question of the administration of the Bankruptcy Act, that the Referee in Bankruptcy abused his discretion, in conflict with the decision of this Court in *Langnes* v. *Green*, 282 U. S. 531, 541, wherein discretion is defined?

5. In the administration of the Bankruptcy Act does the Referee in Bankruptcy owe the duty to the creditors seeking the assistance of a Court of Bankruptcy in subjecting property to the payment of debts, to see that the property brings something like its true value, and the duty to do something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act?

6. Should the rule of practice prevail giving the referee or judge plenary control of its judgments and orders during the pendency of the bankruptcy proceedings and within 6 months after the entry of any judgment or order, or should the administration of the Act be restricted and hampered by application of rule of practice denying the referee or judge control of judgments and orders, except for causes which would be sufficient after expiration of the term or six months?

IV.

REASONS FOR GRANTING THE WRIT.

1.

Because the decision of the circuit court of appeals was on an important question of federal law and probably is in conflict with the decisions of this court in the following cases:

Langnes v. *Green*, 282 U. S. 531, 541.
Graffam v. *Burgess*, 117 U. S. 180, 192.
Gelfert v. *National City Bank*, 313 U. S. 221, 231, 232.

The decision of the Circuit Court of Appeals was on an important question of Federal law, viz., the Bankruptcy Act.

The Circuit Court of Appeals held that the Referee in Bankruptcy abused his discretion in setting aside the original sale and the confirmation thereof.

The Circuit Court of Appeals so found upon a Record wherein the Referee made extensive and detailed findings of fact at the time the original sale was set aside and the second sale was had (R. 15-20), and the District Court on review adopted them as the findings of fact of the Court (R. 51).

Both the Referee and the District Court on review found that the sale price at the original sale, $4,250 was grossly inadequate (R. 19 and 51). The sale price at the second sale was $9,050 (R. 22).

The grossly inadequate price shocked the conscience of the Referee to the extent that he set the sale aside and ordered a new sale.

The District Court, on review after adopting all the findings of fact of the Referee, in his opinion (R. 57)

stated: "The Referee found, upon considering the petition to set this sale aside, that the bid at the original sale was grossly inadequate. But he failed to find that there were any suspicious circumstances in the conduct of the sale."

From this the District Court on review concluded erroneously that the rule of law applicable in the case at bar was in substance that a finding of gross inadequacy of price must also be accompanied by a finding of suspicious circumstances in the conduct of the sale.

It was upon the application of this erroneous rule of law, that the District Court on review held that the Referee abused his discretion.

The Circuit Court of Appeals correctly stated the rule of law, viz.: That mere inadequacy of price unaccompanied by any facts showing unfairness in the sale or raising any doubt as to the integrity of the sale would not justify setting aside the sale, but the Circuit Court of Appeals applied that rule erroneously in the case at bar, completely ignoring the finding of gross inadequacy of price by the Referee and the adoption of that finding as the finding of the District Court on review.

The Circuit Court of Appeals in view of the finding of gross inadequacy of price by the Referee and the adoption of that finding by the District Court on review, should have applied the rule that equity will set aside a sale if the inadequacy is so great as to shock the conscience.

This Court has held that:

> "It is quite uniformly the rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience * * *"
>
> *Gelfert* v. *National City Bank*, 313 U. S. 221, 232.

This Court has held:

> "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or * * *" (*Graffam* v. *Burgess*, 117 U. S. 180, 192).

The District Court on review did not find that the Referee had reached his conclusion arbitrarily, capriciously or in the misapplication of any rule of law and therefore had abused his discretion.

This Court has defined discretion in the following language:

> "The term discretion denotes the absence of a hard and fast rule (citations). When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result" (*Langnes* v. *Green*, 282 U. S. 531, 541).

What other steps should the Referee have taken to make his action "right and equitable under the circumstances and the law"?

The discretion of the Referee was "directed by the reason and conscience of the judge to a just result."

In the light of subsequent events as shown by the record, namely that instead of $4,250 the sum of $9,050 was obtained, can the Court say that the Referee abused his discretion in setting aside the sale and confirmation and ordering a resale of the property?

There was not a scintilla of evidence in the record tending to show any increase in market value of the operating rights of the bankrupt between the date of the first sale, to-wit: December 18, 1944, and the date of the second sale, to-wit: January 31, 1945.

In the case at bar, the sale was of operating rights of the bankrupt truck lines and it was a judicial sale.

This Court has held with reference to judicial sales of realty:

> "The control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history (citations) * * * We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression" (*Gelfert* v. *National City Bank*, 313 U. S. 221, 231, 232).

2.

Because the decision rendered by the circuit court of appeals is in conflict with the decision of the Eighth Circuit Court of Appeals on the subject of judicial discretion in the following case:

Currin v. *Nourse*, 66 F. 2d 137 (Eighth Circuit).

In the case of *Currin* v. *Nourse*, 66 F. 2d 137, decided by the Circuit Court of Appeals, Eighth Circuit, opinion by Circuit Judge Sanborn, Syl. 6 reads:

> "6. Bankruptcy—264, 269. Referee's denial of opportunity for bankrupt's unsecured creditors to examine contract for sale of bankrupt's property and be heard fully on question of confirming sale held abuse of power, necessitating reversal of orders confirming sale, denying motion to set aside confirmation, and allocating proceeds."

The facts were that at a general meeting of creditors, attended by appellant creditors, the trustee reported that he had entered into a contract to sell the assets to Stern

Bros. No creditor knew of the terms or conditions of the contract of sale nor the price to be paid until the meeting.

In the opinion on page 139 appears the following:

> "The appellants at once requested an opportunity to examine the contract before the sale was confirmed, and to be heard upon the question of confirmation. The trustee was not then able to furnish copies of the contract, but offered to deliver copies on the following day. The referee denied the request for a continuance, refused to postpone confirmation and entered his order approving the sale. * * * On February 18, 1933, the appellants moved that the order confirming the sale be vacated on a number of grounds. They offered to show * * * that the price was inadequate; that the order of confirmation was made without an adequate opportunity for investigation or an adequate opportunity to be heard being afforded them. The referee sustained objections to their offers of proof, and their motion was denied. A petition for the review of each order was duly filed. * * * District Court Judge confirmed the orders of the referee. Thereafter, upon application to this court, appeals were allowed.
>
> "The appellants attack the order of confirmation and the other orders upon various grounds. The important question, we think, is whether the referee abused his discretion in confirming the sale of these properties to the purchaser under the circumstances and without granting to the appellants an opportunity for investigation and a hearing."

In the opinion on page 140 the Court said:

> "The referee should have granted to the unsecured creditors an opportunity to examine the contract of sale and have given them reasonable time to be heard with reference to its confirmation. * * * The unsecured creditors, therefore, were entirely de-

> pendent for the payment of their claims upon the amount received in excess of liens and were, hence, vitally interested in the price to be secured. * * * We think that, under all the circumstances, it was an abuse of power to deny the unsecured creditors an opportunity to be heard fully upon the question of the approval of the sale. The integrity of judicial sales is as important as their stability."

In the opinion on page 141 appears the following:

> "The orders appealed from are reversed. The cases are remanded, with directions that the appellants be given a full and fair opportunity to be heard upon the question of the confirmation of the sale."

The petitioner, in the case at bar, respectfully submits therefore, that the two unsecured creditors who moved to set aside the sale, were vitally interested in the price to be secured and had an indisputable claim upon the amounts received in excess of liens and costs of administration, and if they had received notice of the sale or had knowledge of the bankruptcy proceedings in time to have attended the sale, were entitled as unsecured creditors to have been heard fully upon the question of the approval of the sale and the price to be secured and especially to show that the price bid was grossly inadequate.

In the case at bar, the Circuit Court of Appeals for the Tenth Circuit has held it to be an abuse of discretion for the referee to permit unsecured creditors to be heard fully upon the question of the approval of the sale, whereas the Circuit Court of Appeals for the Eighth Circuit has held it an abuse of discretion for the referee to deny to the unsecured creditors such an opportunity.

3.

Because the importance of the questions relating to the administration of the Bankruptcy Act is such that this court should grant certiorari.

Ballentyne v. *Smith*, 205 U. S. 285, 289.
Continental Illinois National Bank and Trust Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675.
Birkett v. *Columbia Bank*, 195 U. S. 345, 350.
U. S. v. *Commercial Credit Co.*, 286 U. S. 63, 67.

It is important for the orderly administration of the Bankruptcy Act that the findings of the Referee in Bankruptcy on conflicting evidence remain undisturbed except for most extraordinary circumstances.

In the case at bar, the crucial question before the Referee was one of fact—Did the evidence show mere inadequacy of price which must be accompanied by evidence of circumstances throwing doubt on the integrity of the original sale, or did the evidence show gross inadequacy of price sufficient to shock the conscience of the Referee so that he could and should set aside the original sale?

The Referee found such gross inadequacy of price (R. 19), and the District Court on Review adopted that finding as the finding of the Court (R. 51).

The Circuit Court of Appeals decision ignored the finding of gross inadequacy of price by the Referee which shocked his conscience to the extent that he set aside the original sale and ordered a resale, and which finding of gross inadequacy was adopted as the finding of the Court.

The Circuit Court of Appeals decision rested basically on that Court's belief that mere inadequacy of price existed and therefore it would have to be accompanied by

circumstances throwing doubt on the integrity of the original sale.

From such belief the Circuit Court of Appeals held that the Referee abused his discretion in setting aside the original sale.

It is not the province of the Circuit Court of Appeals to review facts found by both the Referee and the District Court on Review and to conclude that mere inadequacy of price existed instead of gross inadequacy which shocked the conscience of the Referee, unless the Circuit Court of Appeals, from an examination of the entire record, makes the finding that there was no evidence in the record tending to support such findings of both the Referee and District Court.

No such finding was made by the Circuit Court of Appeals.

This Court has held:

> "These concurrent findings of the two Courts as this Court has often held, should be accepted as conclusive unless clearly erroneous."
>
> *Continental Illinois Nat'l Bank & Trust Co.* v. *C., R. I. & P. Ry. Co.*, 294 U. S. 648, 678.
>
> *U. S.* v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Furthermore the Circuit Court of Appeals did not find that the Referee reached his conclusion arbitrarily, capriciously or in the misapplication of any rule of law.

The rule of law upon which the decision of the Circuit Court of Appeals rested does not apply to gross inadequacy of price which shocked the conscience of the Referee to the extent that the Referee set aside the original sale and ordered a resale.

Referee Owes a Duty to Creditors.

This Court has held that a Court of Bankruptcy is a court of equity (*Continental Illinois National Bank and Trust Co.* v. *Chicago, R. I. and P. Ry. Co.*, 294 U. S. 648, 675).

This Court has held, concerning the duty that a court of equity owes to creditors:

> "Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid, or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the creditors make no effort, and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought" (*Ballentyne* v. *Smith*, 205 U. S. 285, 289).

Hearing to Set Aside Sale.

The hearing was held upon the application of two unsecured creditors, to whom no notice of sale had been sent and who had no knowledge of bankruptcy proceedings until some two weeks or more after the sale for $4,250.

At the hearing to set aside the sale three witnesses testified they were prepared to forthwith make bids substantially in excess of $6,250 which was already on deposit, and that each qualified as being a motor carrier operating in excess of 17 and 20 motor vehicles, respectively (R. 11).

It is submitted that the two unsecured creditors who moved to set aside the sale, were vitally interested in the price to be secured and had an indisputable claim upon the amounts received in excess of liens and costs of administration, and if they had received notice of the original sale for $4,250 or had knowledge of the bankruptcy proceedings in time to have attended the sale, they were entitled as unsecured creditors to have been heard fully upon the questions of the approval of the sale and the price to be obtained—and especially to show that the price bid was grossly inadequate.

Notice of Sale Required by Act.

11 U. S. C. A. 94 (Sec. 58 of the Act) deals with notices to be given to creditors of the several more important steps in a proceeding under the Act.

Under subdivision (a) it is provided that creditors shall have at least 10 days notice by mail, to their respective addresses as they appear on the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of some eight classified steps in the proceedings.

Number 1 relates to examination of the bankrupt.

Number 4 relates to proposed sales of property.

Only Actual Knowledge on the Part of a Creditor Can Obviate the Necessity of a Notice Mailed to Him in Accordance with the Act.

This Court has defined actual knowledge of bankruptcy proceedings:

"Actual knowledge of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends. * * * That the law should give a creditor remedies against the estate of a bankrupt notwithstanding the neglect or default of the bankrupt is natural. The law would be, indeed, defective without them" (*Birkett* v. *Columbia Bank,* 195 U. S. 345, 350).

4.

Because the ruling of the United States Circuit Court of Appeals as to practice is erroneous and might tend to introduce confusion into the law.

Zimmern v. *U. S.,* 298 U. S. 167, 169.

This Court has granted certiorari to review a ruling as to practice that might tend, if erroneous, to introduce confusion into the Law. *Zimmern* v. *U. S.,* 298 U. S. 167, 169.

This Court has held the Judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. *Zimmern* v. *U. S., supra,* 170.

The United States Circuit Court of Appeals decision rested upon the rule of practice which requires that after the expiration of the term of Court that the inadequacy of consideration must be accompanied by facts presented showing unfairness or impropriety in the sale or raising doubt as to the integrity of the sale.

Since the Circuit Court in its opinion properly held that a proceeding in bankruptcy from the time of its commencement to its conclusion is but one suit and that a

Court of Bankruptcy has no separate terms, hence the rules with respect to the want of power in a Court of equity to vacate a decree after the expiration of the term at which it was entered do not apply, but those rules apply only to the reasons for vacating judgments after the expiration of the term.

The Circuit Court of Appeals decision, in the case at bar, erroneously applied the practice applicable after the expiration of the term of Court when it should have applied the rule of practice that prevails giving the referee or judge plenary control of its judgments while term of Bankruptcy Court is still in effect as modified by Rule 60(b) of the Rules of Civil Procedure.

CONCLUSION.

The questions presented are of such importance in the administration of the Bankruptcy Act that this Court should grant certiorari. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and is in conflict with the decision of another Circuit Court of Appeals. The ruling of the United States Circuit Court of Appeals as to practice is erroneous and might tend to introduce confusion into the law.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS R. GATES,
Counsel for Petitioner.